

FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2019] FCA 1529

Appeal from: Application for extension of time: *Singh v Minister for Immigration and Anor* [2018] FCCA 3513

File number: VID 23 of 2019

Judge: **BROMBERG J**

Date of judgment: 11 September 2019

Catchwords: **MIGRATION** – application for extension of time to appeal from decision of the Federal Circuit Court – whether the applicant has a reasonable prospect of success on appeal – application dismissed.

Legislation: *Migration Regulations 1994* (Cth) cl 886.25, PIC 4020

Cases cited: *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585

Date of hearing: 11 September 2019

Registry: Victoria

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 20

Counsel for the Applicant: The Applicant appeared in person

Counsel for the First Respondent: Mr C McDermott

Solicitor for the First Respondent: DLA Piper

Counsel for the Second Respondent: The Second Respondent filed a submitting notice, save as to costs

ORDERS

VID 23 of 2019

BETWEEN: **MANDEEP SINGH**
Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **BROMBERG J**

DATE OF ORDER: **11 SEPTEMBER 2019**

THE COURT ORDERS THAT:

1. The applicant's application for an extension of time is dismissed.
2. The applicant pay the first respondent's costs of that application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMBERG J:

1 The applicant has applied for an extension of time in which to bring an appeal from the judgment of the Federal Circuit Court of Australia published as *Singh v Minister for Immigration and Anor* [2018] FCCA 3513. The primary judge dismissed Mr Singh's application for review of a decision of the Second Respondent ("**Tribunal**") dated 16 March 2017. The Tribunal had affirmed the decision of a delegate of the first respondent ("**Minister**") not to grant the applicant a Skilled (Residence) (Class VB) visa ("**visa**").

BACKGROUND MATTERS

2 Mr Singh is a citizen of India. He arrived in Australia in November 2006 as the holder of a Student Visa which was valid until 31 December 2008. Just before the expiration of his Student Visa, Mr Singh applied for the visa.

3 In November 2014, a delegate of the Minister refused to grant Mr Singh the visa. The principal basis for the refusal was that Mr Singh did not satisfy cl 886.225 of Sch 2 of the *Migration Regulations 1994* (Cth) ("**Regulations**"). Clause 886.225 of the Regulations required that an applicant for a visa satisfy Public Interest Criterion 4020 ("**PIC 4020**"). That criterion is set out in Sch 4 of the Regulations. Relevantly, PIC 4020(1) provided:

There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the [Administrative Appeals Tribunal], a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- a. the application for the visa; or
- b. a visa that the applicant held in the period of 12 months before the application was made.

4 The delegate found that the applicant had given a "bogus document", being a Skills Assessment dated 27 October 2008 issued by Trades Recognition Australia. The delegate suspected that the Skills Assessment had been obtained by a false statement made to Trades Recognition Australia about the applicant's claimed work experience at O'Heas Bakery and Deli.

5 The applicant then applied to the Tribunal for a review of the delegate's decision. Relevantly, on 24 February 2017, the Tribunal issued an invitation to the applicant pursuant to s 359A of the *Migration Act 1958* (Cth). The content of that invitation was described at

[11] of the Tribunal's reasons, a fair summary of which was provided in the Minister's submissions at [10] as follows:

In the second s 359A invitation, the Tribunal invited Mr Singh to comment on adverse information related to the 'activities of Carmine Amarante', the central proposition being that Mr Amarante had admitted to creating fraudulent documents (including false work references) for various businesses (such as O'Heas Bakery & Deli) for migration purposes. The details of Mr Amarante's admission (including as to the nature of the fraudulent enterprise) were summarised and put to Mr Singh for his comment. It was also put to him that a work reference document with his name, date of birth and his employer identified as O'Heas Bakery and Deli had been found in evidence obtained in a search of Mr Amarante's premises. It was also put to Mr Singh that he had entered Australia 12 days after the date when he was said in the work reference to have commenced work at O'Heas Bakery & Deli. The Tribunal explained why the matters it identified could give rise to it finding that there is evidence that the work reference letter submitted to Trades Recognition Australia was false or misleading apropos Mr Singh's claimed work experience, that the Skills Assessment that had therefore been obtained from Trades Recognition Australia because of that false or misleading work reference, and that the Skills Assessment had subsequently been given to the Minister for the purposes of his visa application. On that basis, it was therefore possible that Mr Singh did not satisfy PIC 4020(1).

6 The applicant did not respond to the s 359A invitation and the Tribunal determined the review application before it without a hearing. The Tribunal's entitlement to do so is not in contest.

7 On 16 March 2017, the Tribunal affirmed the decision of the delegate.

8 In its decision, the Tribunal identified that the dispositive issue on the review was whether the criterion in PIC 4020(1) was satisfied.

9 The Tribunal's conclusion on that issue is set out at [25]:

On the basis of the above evidence the Tribunal finds that the skills assessment is a bogus document. The Tribunal reasonably suspects that the skills assessment is a document that was obtained because of a false or misleading statement, being that Mr Singh worked for O'Heas Bakery and Deli over the period stated for the number of hours stated. Having regard to the evidence, in particular Mr Singh's then representative's emails to the Department, submitting the a (sic) copy of the skills assessment and the work reference on the basis of which the skills assessment was issued, the Tribunal is not satisfied that there is no evidence that Mr Singh has given or caused to be given to the Minister a bogus document.

10 Having concluded that the PIC 4020(1) criterion was not satisfied, the Tribunal considered whether the requirements of that criterion ought to be waived and concluded not do so for the reasons given at [32]-[34].

11 The primary judge considered two grounds of challenge made by the applicant to the decision of the Tribunal and dismissed each.

THE APPLICATION FOR AN EXTENSION OF TIME

12 The applicant's application for an extension of time was accompanied by a Draft Notice of Appeal. A single ground of appeal is there set out and particularised as follows (errors in original):

1. The court committed jurisdictional error when making the following findings:

- There was ample evidence before the Tribunal, upon which it relied, that the work reference from O' Hea's Bakery & Deli contained false or misleading statements and that the skills assessment was obtained because of those false or misleading statements
- It was open to the Tribunal on the material before it to find that the skills assessment was a bogus document and to reject the applicant's claim to the contrary

Particulars

The court failed to consider the statement in the Appellant's statutory declaration made on 10 November 2014 in response to the allegation of a bogus document made by the Department of Immigration in its letter dated 13 October 2014. The Appellant stated *"After six year of lodgement of my skilled sponsored visa subclass 886, I got this letter which is most surprising and disturbed contends in my life ever ... Moreover, I tried to contact with my bakery employer, But now new management is running this business. So they cannot help me."*

The Appellant has been prejudiced by the lateness of the allegation which was made almost 6 years after the subclass 886 visa application was lodged. The Court failed to consider that the Appellant was not in a position to provide any alternative or contrary evidence in his favour due to an undue delay by the Department in making the allegation of the bogus document. Failure to consider such prejudice to the Appellant amounts to jurisdictional error in the decision-making process.

13 The applicant's application for an extension of time was also accompanied by an affidavit of the applicant which sought to provide an explanation as to why he had not lodged an appeal within time.

14 On the appeal, the applicant was not represented. He did not file any written submissions. By his oral submissions, he contended that he had been kept in the dark, that for some two years after he had made his application for the visa he had been given few details in relation to any allegation of a bogus document having been provided to the Department. He went on to say that by the time he really understood what was confronting him, it was all too late, because his former employer was no longer operating the business in which he had worked and his opportunity to respond to the allegations made against him was limited. He also complained, with significant justification in my view, about the 6 years it seems to have taken the Department to have processed his application.

- 15 The Minister opposed the application for an extension of time. The Minister's submissions helpfully identified the factors that guide the Court's exercise of the discretion to grant an extension of time. Those factors include the length of the delay, the explanation for the delay, any prejudice to the respondent arising from the delay and whether there are reasonable prospects of success in the proposed grounds of appeal. That last factor, as the Minister's submissions acknowledged, is to be assessed at a 'reasonably impressionistic level': *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585 at [62] (Mortimer J).
- 16 The applicant was some twenty-six days out of time for lodging an appeal at the time he made this application. The Minister does not contend that any prejudice will be suffered as a result of a delay in the applicant instituting an appeal. An explanation for the delay has been provided, although as the Minister contended, the explanation is not comprehensive in the sense that at least some of the delay is not explained. However, as the Minister's submissions recognised, in the circumstances, the factor of greatest importance is whether or not the applicant has a reasonable prospect of success on his proposed ground of appeal. To my mind, that is the determinative consideration.
- 17 Generously read in the applicant's favour, the applicant's ground of appeal challenges findings made by the primary judge on the basis of two matters set out in the particulars to the ground. The first is that there was a failure of the primary judge to identify that the Tribunal had failed to consider a statement made by the applicant in a statutory declaration made on 10 November 2014. In that statement the applicant had in effect stated that, given the expiry of some 6 years between the lodgement of his application for a visa and the notice given to him of the alleged bogus documents, he had not been able to properly respond because he could not obtain the assistance of his former employer, as the business in question was under new management and could not assist him.
- 18 The allegation that the Tribunal failed to consider those alleged difficulties faced by the applicant is, however, without merit. The applicant's statutory declaration referred to in the particulars to his proposed ground was considered by the Tribunal and referred to at [18] of the Tribunal's reasons. The applicant's assertion that he had been unable to contact his former employer to provide evidence to support him was referred to at [20] and [22] of the Tribunal's reasons. I agree with the Minister's submission on this aspect of the proposed ground of appeal, that all that the applicant is seeking to do is challenge the importance or the

weight that the Tribunal gave to the asserted inability of the applicant to contact his former employer, in the light of the other material that the Tribunal had regard to. There is no reasonable prospect of jurisdictional error being identified in the Tribunal's decision on this aspect of the proposed ground of appeal.

19 The second aspect of the applicant's proposed ground of appeal is similar to the first. The applicant again seeks to rely on the prejudice to him caused by the passing of time between when the visa application was lodged and when the allegation of a bogus document was first raised with the applicant. The applicant essentially asserts that the primary judge failed to identify that the Tribunal failed to consider that he was not in a position to provide any alternative or contrary evidence in his favour due to the delay in the making of the allegation of a bogus document. The failure to consider that prejudice is asserted to be jurisdictional error.

20 As stated already, at [18], [20] and [22] of its reasons, the Tribunal referred to the applicant's assertion that he was unable to obtain assistance from his former employer. It is clear that the asserted prejudice was considered by the Tribunal. All that seems to be raised by the applicant in this regard is a challenge to the merits of the Tribunal's conclusion. When the applicant's proposed ground alleges a failure to consider, he is really alleging a failure by the Tribunal to give the prejudice he asserted sufficient importance or sufficient weight. A failure of that kind would not constitute jurisdictional error. The proposed ground of review fails to raise any arguable basis for a conclusion that the primary judge failed to identify a jurisdictional error made by the Tribunal. For those reasons the draft ground of appeal is without merit and the grant of an extension of time would be futile. The applicant's application for an extension of time must be rejected. I will make an order that the applicant pay the Minister's costs of the application.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 17 September 2019

